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DUE PROCESS OF LAW IN PROCEEDINGS BEFORE A CITY
COUNCIL TO DISANNEX TERRITORY UNDER
THE INDIANA LAW

The provision of the Indiana Constitution which requires that there shall be a separation of the executive, legislative, and judicial powers in the state government¹ has been held not to apply to municipal corporations or town and local boards created by the legislature.² It is aimed at the structure of the state government as created by the constitution. This conclusion does not do violence to the language of a constitutional provision requiring the separation of powers and it is in keeping with the probable intent of those who framed this particular provision.³ The result is a practical one which is necessary to the efficient working of our local government units. It would be exceedingly cumbersome if we had to have a strict division of authority on the lines of executive, legislative, and judicial functions in all the minor details of town and city government.

Granting this interpretation of the separation of powers as required by the constitution, there remains the principle which was a part of the common law and which has been given definite content in this country through the interpretation of the fourteenth amendment, that personal rights and private property shall not be taken without due process of law. Thus not only in the common law, but probably in all known systems of law, we have the principle that "one may not be judge in his own case."⁴ This was considered to be an essential

¹"The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Constitution of Indiana (1851) Act III, Sec. I.

²"The appellee argues that this cannot be done because it would be a violation of article 3 of the Constitution of Indiana. The appellee is in error.

In *Baltimore & Ohio Ry. Co. v. Town of Whiting*, 161 Ind. 228 68 N. E. 266, this court held that this provision of the Constitution relates solely to the state government and officers and their duties under one of the separate departments of the state and not to municipal government and officers. The executive and administrative duties of the mayors of cities and clerks of towns or cities are not such as come within the executive and administrative department of the state government." *Livengood et al. v. City of Covington* (Supreme Court of Indiana) 144 N. E. 416 at 419. See also *State ex rel. v. Kirk*, 44 Indiana 401.

³"The office of councilman is an office purely and wholly municipal in its character. He has no duties to perform under the general laws of the state . . . these powers and duties of councilmen are beyond and in addition to any acts, powers and duties performed by officers provided for under the state government." *State ex rel. v. Kirk*, 44 Ind. 401 at 406.

⁴"*Alquis non debet esse iudex in propria causa.*" Coke upon Littleton Sec. 212.

part of a fair trial according to law. At least from the time of Magna Charta, the English courts acting on common law principles have not hesitated to hold judicial proceedings invalid where private rights or property were affected, if the proceedings were not before an impartial tribunal.⁵ In the United States this same result was reached under the fifth amendment to the constitution, and later it was specifically covered for state legislation by the fourteenth amendment. Under the fourteenth amendment the courts have held that whatever else may be necessary to due process of law it is certain that one may not be deprived of personal liberty or private property without due notice and a fair hearing.⁶ Now what shall constitute "due notice" and a "fair hearing" in the particular case, is, of course, a matter for the determination of the courts in view of the actual situation involved. Thus what would be a fair hearing in the granting of a license to practice a trade or profession might not be a fair hearing to take valuable property under condemnation proceedings; but regardless of the kinds of rights affected or the amount of property involved, there has been very little qualification of the rule that the tribunal which is deciding the matter must be impartial.⁷

⁵ "It is against reason, that if wrong be done any man, that he thereof should be his own judge. For it is a maxim in law, *aliquis non debet esse iudex in propria causa*. And therefore a fine levied before the bailiffs of Sapol was reversed, because one of the bailiffs was party to the fine, *quia non protest esse iudex et par*." 14 Vin. Abr. 573. 4 Com. Dig. 6. See also 2H. 3. 4.; 3H. 4.; 8H. 6. 19.; 5H. 7. 9. B.

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and there are *leges legum*." Cooley, Constitutional Limitations, Seventh Edition, 592.

⁶ "As applied to the chief executive officers of the federal and state governments, municipal officers, heads of bureaus or departments, revenue and tax commissioners or boards, boards of health, and the like, the constitution forbids them to deprive any citizen of his property or rights in any arbitrary, unjust, or confiscatory manner, or in any proceeding to which he is not a party, although, if he has proper notice, the constitutional requirement is satisfied by giving him a full and fair opportunity to be heard in his own behalf and in defense of his rights or property, either in the proceedings before the board or officer, or else on an appeal to the courts, to which he shall be entitled as of right and without onerous restrictions or conditions . . ." Black's Constitutional Law, pp. 595 and 596.

See also *United States v. Ju Toy*, 198 U. S. 252, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Frank Waterhouse & Co. v. United States*, 159 Fed. 876, 87 C. C. A. 56; *Hopkins v. Faehant*, 130 Fed. 839, 65 C. C. A. 1; *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; *Smith v. State Board of Medical Examiners* (Iowa) 117 N. W. 1116.

⁷ "To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any

In *Town of St. John, etc., v. John P. Gerlach, et al.*, (decided February 19, 1926),⁸ the supreme court of Indiana has upheld the constitutionality of an Indiana statute which provides for a proceeding before the common council of a city where individuals wish to have the subdivision in which they live disannexed from the city of which it then forms a part. (38913-8918, Burns 1914, Ch. 279 I acts 1 1907.)⁹ The statute provides that wherever the owners of one-tenth or more of the lots in such subdivision desire disannexation from the city, they may file a petition before the common council praying for disannexation of the entire subdivision. Remonstrances against such disannexation may be filed by any other owners of lots in the subdivision and "such order shall be made by the . . . council

rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly." Cooley—Constitutional Limitations, Seventh Edition, 594.

See also *Ames v. Port Huron Log-Driving and Booming Co.*, 11 Mich. 139; *Hall v. Thayer*, 105 Mass. 219; *State v. Crane*, 36 N. J. 394; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Scuffletown Fence Co. v. McAllister*, 12 Bush, 312; *Reams v. Kearns*, 5 Cold. 217.

⁸ *Town of St. John & etc. v. John P. Gerlach et al.*, No. 24427, Supreme Court of Indiana. Decided February 19, 1926.

⁹ "The owner or owners of one-tenth or more in number of the lots in any addition or subdivision to any city or town may file his, their or its petition in writing with the board of public works or common council of any city or board of trustees of any town praying for the disannexation of said entire addition or subdivision, if one side or more thereof, or any part of the same, shall form the corporate boundary of such city or town, setting forth a copy of such plat, notice of the filing of which and the hearing thereon shall be given as provided in this act. Remonstrances against the granting of such petition may be filed by the owner of any lot or lots in such addition, and such order shall be made by the board or council hearing the same as shall be just and equitable in the premises: *Provided, however*, that if the owner or owners of more than one-half of the lots in such addition or subdivision file his, their or its remonstrance or remonstrances in writing against the granting of the petition for disannexation the board or council hearing the same shall have no power or jurisdiction to proceed further, but shall at once dismiss such proceedings at the cost, if any incurred, of the petitioner or petitioners. If an appeal shall be prosecuted from the board or council the city or town may by its attorney appear therein and take such action as the due protection of its interests may require . . ." Sec. 8913, Burns, 1914.

"When authority is herein given to and conferred upon the board of public works or common council of any city or the board of trustees of any town, to hear and determine any matter, such board or council shall have the power to call witnesses by subpoena to appear before it, to punish for a contempt of its authority, and to adjourn its hearings from time to time as to said board or council may seem expedient. An appeal will lie from the decision of any board to the circuit court of the county where any of the lots or lands affected lie, whereupon said matters shall be tried *de novo* with like proceedings as other civil actions . . ." Sec. 8917 Burns, 1914.

hearing the same as shall be just and equitable in the premises." But the council may grant or refuse the petition even though no one contests it. It is further provided that if an appeal is taken from the decision of the city council, "the city . . . may by its attorney appear therein and take such action as the due protection of its interests may require." The statute provides that if there is no appeal from the decision of the council, the record shall be certified to the county auditor for taxation purposes in conformity with the decision. But there is also a right of appeal to the circuit court of the county in which the land lies. Such later trial in the regular courts shall be *de novo*, conducted according to the usual procedure of such courts with full right of appeal to the Supreme Court of the state.

It appeared in *Town of St. John v. Gerlach*¹⁰ that the appellees had petitioned the council under this statute for disannexation of a certain territory and the petition had been denied. There was a trial *de novo* in the circuit court in which this decision of the city council was reversed, and it was decreed that disannexation should be granted. On appeal to the supreme court the judgment below was affirmed but the question of the constitutionality of the statute was not discussed since the court said that this had already been determined in *Livengood v. City of Covington*.¹¹ This case involved the same provisions as the St. John case. The supreme court upheld the constitutionality of the statute and based its decision in this part of the case entirely upon *Forsythe v. City of Hammond*.¹² It was conceded by both parties in the case that the city council in passing upon the question with an appeal to the courts was acting in a judicial capacity. The decision in *Forsythe v. Hammond* definitely held that the annexation of property to a municipality was a legislative function, but since the Indiana constitution did not prevent a merging of legislative and judicial functions in the field of municipal government, the statute was not bad on that ground.¹³

¹⁰ Ante Note 7.

¹¹ *Livengood et al. v. City of Covington* (No. 42124, Supreme Court of Indiana, June 11, 1924), 144 N. E. 416.

¹² *Forsythe v. City of Hammond*, 142 Ind. 505, 40 N. E. 267, 30 L. R. A. 576. Litigation involving the same parties took place in the Federal Courts when the plaintiff prayed an injunction forbidding the city to collect taxes under the decision of the county board. Here also the court upheld the statute saying that judicial proceedings before this legislative body were peculiarly fitting in this case since the Indiana constitution required that the boundaries of cities and towns be fixed or changed only by general statutes. *Forsythe v. Hammond*, 68 Fed. 774 at 775.

¹³ "It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board.

It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the

As a matter of controlling judicial decision the case of *Livengood v. City of Covington* seems to be of doubtful authority so far as it upholds these statutory provisions. That part of the decision is rested entirely upon *Forsythe v. Hammond* which did not involve disannexation under this provision of the statute. *Forsythe v. Hammond* involved annexation under Rev. Stat. 1894 Sec. 3659 & 4224; Rev. Stat. 1881.¹⁴ These provisions in the Revised Statutes of 1894 provide that where there has been an annexation of territory to a city against the will of the owner of the property in proceedings before the Board of County Commissioners, there may be an appeal to the circuit court. This is quite a different matter. Thus it is rightly said in the *Forsythe* case that there is a judicial determination of the petition for annexation as between the contesting parties. It appears further that there is a fair trial here since the Board of County Commissioners is not directly interested in any way in a law suit between a city and adjoining property owners.¹⁵ The great difference between the *Forsythe* case based on annexation proceedings in which the city and property owners contest annexation before the Board of County Commissioners, and *Town of St. John v. Gerlach* and *Livengood v. Covington* in which two groups of private owners contest the question of disannexation before a city council is this: in the first case it is an impartial hearing and all the parties at interest are before the court; in the second case the city itself has an interest in the outcome of the case which its own city council is deciding. Since the taxes in the city and financial projects of great importance in the field of public improvements are directly affected by disannexation of part of the city's territory, it is clear that the municipality as a corporation is interested in the outcome of that litigation. No provision, however, is made for the interests of the city to be represented before the council. It seems to be inferred that the city council will look out for the city's interests in those proceedings. This is substantiated by the statute which provides that if there is an appeal from

reasons why, in the opinion of the council the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true, and are sufficient, seem to be questions calling for a judicial examination and decision

But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the Legislature may, as it has done in this case, provide for an appeal to the courts, to determine whether the city council, and the county board have complied with the statutory requirements in the action taken" *Forsythe v. Hammond*, v42 Ind. pp. 516 and 517.

¹⁴ *Forsythe v. Hammond*, 142 Ind. pp. 505 and 507.

¹⁵ Ante Note 12.

the decision of the council to the circuit court "the city . . . may by its attorney appear therein and take such action as the due protection of its interests may require." In both the *Town of St. John v. Gerlach* and *Livengood v. City of Covington*, the city whose council had been judge in the first trial was one of the principle parties litigant in the trial *de novo* on appeal.

The statute provides for trial *de novo* in the circuit court upon appeal from the decision of the city council. It might be contended that since there was a completely new trial, the fact that the city was interested in the result did not make the proceedings bad. Such reasoning would go on the ground that the hearing before the council was an administrative investigation of a preliminary nature and that it was not unconstitutional to require this in view of the fact that disannexation of territory was essentially a legislative matter anyway. Such a position, however, is not tenable. It is conceded that the council renders a judicial decision under this statute. Thus for these purposes the council is made a part of the entire judicial system, and it is well settled that a court created by the constitution and independent of the legislature cannot be required on appeal to hear cases that are not of a judicial nature.¹⁶ In case of collateral attack the courts would hold that this decision by the city council would have all the dignity and prerogatives of a judicial decision. It may be added that while the technical significance of trial *de novo* is conceded, several courts have taken the view that the decision in the first instance is not nugatory in its effect upon the higher court, but that it has considerable persuasive value inasmuch as the whole matter is considered to be partly political rather than entirely a question of judicial determination of private rights.¹⁷

While in general a statute resting judicial authority in a tribunal is unconstitutional if that body has an interest which would prejudice an impartial determination of the case, there are still certain exceptions to this rule. It may be conceded that these exceptions lie for the most part in this very field of local governing bodies. There are many cases which uphold the constitutionality of statutes that require interested bodies to pass upon the claims of minor public office holders. These bodies are held to give a valid judicial decision although their members may be advantaged by holding the present occupant to be disentitled to the office. It is submitted that these cases are limited in scope and that they form an exception to the general rule. They go on the ground that the right to public office is a political question ;

¹⁶ *Heyburn's case*, 2 Dall. 409; *Muskrat v. United States*, 219 U. S. 346.

¹⁷ *Foreman, et al. v. Town of Marianna*, 43 Ark. 324; *Dodson, et al. v. Mayor and Town Council*, Fort Smith 33 Ark. 508.

that it is essentially a public matter for political organs to handle and that rules of procedure in private litigation do not altogether apply.¹⁸

On the other hand the courts have gone far to hold that individual members of bodies exercising judicial functions are disqualified where they have a personal interest in the result.¹⁹ It is submitted that in this case the several members of the city council who pass on disannexation might have such a personal interest in the result that they might be disqualified. Thus members of the city council may be property owners within the city and their general and special taxes greatly increased by disannexation. The cases hold that members of a court may be affected in their personal taxes by a decision involving bona fide litigants and still be qualified to decide the case. But that situation is not involved here. One of the parties directly affected by this proceeding is the city itself and it is represented only by its own city council which is sitting in judgment on the case. The decision in the case does not affect the members of the council incidentally; it affects them as governing officers of the municipal corporation which has a financial interest in the result of the litigation.²⁰

But apart from the probable disqualification of individual members of the council because of financial interest in the result, the most serious objection to the constitutionality of the statute is that the city council as representing the city's interests is exercising a function that is incompatible with a fair hearing as required by due process of law. It would seem strange if the statute provided for the city attorney to represent the city's interests in such a proceeding before the council since it would be patent that the city's legal interests were being pleaded before a *quasi* judicial body which had a very strong legislative bias in favor of the city's claim. This at least would be arguable, however, on the ground that you could have a valid merging of legislative and judicial functions in a municipal body. The present statute cannot be defended on this ground. It does not

¹⁸ *Commonwealth v. Reed*, 1 Gray 475; *Justices v. Fennimore*, 1 N. J. 190; *Commissioners v. Little*, 3 Ohio 289.

¹⁹ *Stahl, et al. v. Board of Supervisors of Ringgold County, et al.* 187 Iowa 1342, 175 N. W. 772, 11 A. L. R. 185; *Luthey v. Ream*, 270 Ill. 170, 110 N. E. 375; *Hunt v. Chicago*, 60 Ill. 183; *Nulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954.

²⁰ *Lanfear v. Mayor, et al.*, 4 Louisiana Annual 97, 23 American Decisions 477. This case seems to involve precisely the same principles as the *St. John case* and the *Covington case*. There an ordinance of the city council authorized the mayor to confiscate property left on the levee in violation of the police regulations. The court held that the amount of property was so great that it could not properly be disposed of summarily under the police power. There must be a judicial hearing on the question and the mayor and council could not decide this case since the city would profit by the sale of the confiscated property.

come within the *Prentiss* case or recent cases that sanction a judicial decision by a body which also exercises legislative functions.²¹ In the instant case, the objection to the city council is not that it may be exercising both judicial and legislative functions as to the litigation before it, but that the municipal corporation, which the council governs, is directly interested in the result and is not represented in the litigation. It seems that the city's interests are entrusted to the council itself and that the council is sitting in judgment on its own case.²²

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²¹ *Prentiss v. Atlantic Coast Line*, 211 U. S. 210.

²² *Stahl v. Board of Ringgold County*, 187 Iowa 1342, 175 N. W. 772, 11 A. L. R. 185.